Supreme Court, U.S.
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In The

Supreme Court of the United States

MANUEL SALVADOR MARTINEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Mr. Martinez's previous deportation without a judge violated 8 U.S.C. § 1227 and Due Process by denying him an impartial judge and, thereby, an informed, voluntary and intelligent admission of deportability?

2. Whether the immigration agent who previously deported Mr. Martinez improperly informed him that he was ineligible for relief as 8 U.S.C. § 1227(a)(2)(A)(iii), by its terms, only applies to aliens "admitted" and would not, therefore, exclude Mr. Martinez from possible relief from deportation?

3. Whether the Government, having previously deported Mr. Martinez without a judge, has rendered its record of the deportation inadmissible hearsay under Rule 803(8)(B) as it is now a matter observed by law enforcement personnel rather than by a judge?

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY LOWER COURTS

Mr. Martinez's petition for rehearing was denied by the Ninth Circuit Court of Appeals on February 8, 2007. The Ninth Circuit Court of Appeals memorandum decision was entered in Ninth Circuit Court of Appeals No. 06-10006 on December 7, 2006.

STATEMENT OF THE BASIS FOR JURISDICTION

The order of the United States Court of Appeals for the Ninth Circuit denying Petitioner's Appeal was entered on December 7, 2006. Petitioner's motion for rehearing was denied on February 8, 2007. This Petition for Writ of Certiorari is timely filed within 90 days of that date, pursuant to Supreme Court Rule 13. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND FEDERAL PROVISIONS INVOLVED

U.S. CONST. amend. V, provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

8 U.S.C. § 1101(a)(13)(A), provides in pertinent part:

> "The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer."

8 U.S.C. § 1182(h), provides in pertinent part:

> **§ 1182. Inadmissible aliens**
>
> **(a) Classes of aliens ineligible for visas or admission**
>
> Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:
>
> . . .
>
> (2) Criminal and related grounds
>
> (A) Conviction of certain crimes
>
> (i) In general Except as provided in clause
>
> (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or
>
> (II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21),
>
> is inadmissible.
>
> . . .

(h) Waiver of subsection (a)(2)(A)(i)(I), (II), (B), (D), and (E)

The Attorney General may, in his discretion, waive the application of subparagraphs (A)(i)(I), (B), (D), and (E) of subsection (a)(2) of this section and subparagraph (A)(i)(II) of such subsection insofar as it relates to a single offense of simple possession of 30 grams or less of marijuana if –

(1)

(A) in the case of any immigrant it is established to the satisfaction of the Attorney General that –

(i) the alien is inadmissible only under subparagraph (D)(i) or (D)(ii) of such subsection or the activities for which the alien is inadmissible occurred more than 15 years before the date of the alien's application for a visa, admission, or adjustment of status,

(ii) the admission to the United States of such alien would not be contrary to the national welfare, safety, or security of the United States, and

(iii) the alien has been rehabilitated; or

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident

spouse, parent, son, or daughter of such alien; or

(C) the alien qualifies for classification under clause (iii) or (iv) of section 1154(a)(1)(A) of this title or classification under clause (ii) or (iii) of section 1154(a)(1)(B) of this title; and

(2) the Attorney General, in his discretion, and pursuant to such terms, conditions and procedures as he may by regulations prescribe, has consented to the alien's applying or reapplying for a visa, for admission to the United States, or adjustment of status.

No waiver shall be provided under this subsection in the case of an alien who has been convicted of (or who has admitted committing acts that constitute) murder or criminal acts involving torture, or an attempt or conspiracy to commit murder or a criminal act involving torture. No waiver shall be granted under this subsection in the case of an alien who has previously been admitted to the United States as an alien lawfully admitted for permanent residence if either since the date of such admission the alien has been convicted of an aggravated felony or the alien has not lawfully resided continuously in the United States for a period of not less than 7 years immediately preceding the date of initiation of proceedings to remove the alien from the United States. No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver under this subsection.

8 U.S.C. § 1227, provides in pertinent part:

§ 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

. . .

(2) Criminal offenses

(A) General crimes

. . .

(iii) Aggravated felony Any alien who is convicted of an aggravated felony at any time after admission is deportable. (Emphasis added.)

8 U.S.C. § 1229c, provides in pertinent part:

§ 1229c. Voluntary departure

(a) Certain conditions

(1) In general

The Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense under this subsection, in lieu of being subject to proceedings under section 1229a of this title or prior to the completion of such proceedings, if the alien is not deportable under section 1227(a)(2)(A)(iii) or section 1227(a)(4)(B) of this title.

Fed. Rule Evid. Rule 803(8) provides in pertinent part:

> **Public records and reports.**
>
> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, of (B) matters observed pursuant to duty imposed by law as to matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

STATEMENT OF THE CASE

The underlying conviction in this case was for 8 U.S.C. § 1326(b)(2), illegal reentry following deportation, with an enhancement for a prior felony conviction. Mr. Martinez was convicted following trial by jury.

The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231 because the defendant was charged with a federal crime. The Ninth Circuit Court of Appeals had jurisdiction over the direct appeal pursuant to 28 U.S.C. § 1291 based on the entry of the final judgment by the district court on November 21, 2005.

ARGUMENT

I

DEPORTATION WITHOUT A JUDGE: MR. MARTINEZ'S PREVIOUS DEPORTATION WITHOUT A JUDGE VIOLATED 8 U.S.C. § 1227 AND DUE PROCESS BY DENYING HIM AN IMPARTIAL JUDGE AND, THEREBY, AN INFORMED, VOLUNTARY AND INTELLIGENT ADMISSION OF DEPORTABILITY

This argument is in two parts. The first part is that, since Mr. Martinez's A-file did not reflect that he was "admitted", he was not within that class of deportable aliens listed in 8 U.S.C. § 1227(a)(2)(A)(iii). See Argument II. Since Mr. Martinez is not within the class of deportable aliens listed in § 1227(a)(2)(A)(iii), he could not statutorily be deported under § 1228(b), which only authorizes the judgeless determination of deportability under § 1227(a)(2)(A)(iii).

The second part of this argument is that, regardless of statutory authority, or the lack thereof, judgeless deportation offends procedural due process. Deportation proceedings must comply with due process. *Zadvydas v. Davis*, 533 U.S. 678, 693 (U.S. 2001) ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent"); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) ("Aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law."). In *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), this Court extended due process protection to deportation proceedings before they may be used as an element of the

crime of illegal reentry and hinted in note 17 that, among other procedural errors, adjudication by a biased judge would be among those errors that would be so fundamental as to prevent subsequent use of the hearing as an element. This Court has repeatedly emphasized the importance of a neutral magistrate to constitutional protections. A state Attorney General cannot sign his own search warrants. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). A magistrate cannot involve himself in an investigation for which he has signed a warrant. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979). A deportation is at least as important and technically nuanced as a search warrant. It should be accorded at least the same protection of a neutral judge, not an agent, and one not involved in the investigation.

II

8 U.S.C. § 1227: THE IMMIGRATION AGENT WHO PREVIOUSLY DEPORTED MR. MARTINEZ IMPROPERLY INFORMED MR. MARTINEZ THAT HE WAS INELIGIBLE FOR RELIEF AS 8 U.S.C. § 1227(a)(2)(A)(iii) WHICH, BY ITS TERMS, ONLY APPLIES TO ALIENS "ADMITTED" AND WOULD NOT, THEREFORE, EXCLUDE MR. MARTINEZ FROM POSSIBLE RELIEF

The INS agent who ordered Mr. Martinez deported in 1998 improperly informed him that he was deportable under 8 U.S.C. § 1227(a)(2)(A)(iii) and that he was therefore ineligible for discretionary relief:

> "You are deportable under section 237(a)(2)(A)(iii) of the Act, 8 USC 1227(a)(2)(A)(iii), as amended."

Notice of Intent to Issue a Final Administrative Removal Order, served December 17, 1998. (RT August 16, 2005, pp.70, 73-76; Government's Exhibit 3; EOR 10, 47, 50-53.)

> "I further find that you have a final conviction of an aggravated felony as defined in section 101(a)(43) of the Act, 8 U.S.C. 1101(a)(43), and are ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion. I further find that the administrative record established by clear, convincing, and unequivocal evidence that you are deportable as an alien pursuant to section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227(a)(2)(A)(iii).

Final Administrative Removal Order, issued December 17, 1998. (RT August 16, 2005, pp.70, 76; Government's Exhibit 4; EOR 12, 47, 53.)

8 U.S.C. § 1227(a)(2)(A)(iii), however, by its terms, only applies to aliens in and admitted to the United States. According to what the Government was able to determine at trial, Mr. Martinez was never admitted to the United States:

> Q. Do you have any information that the defendant, Salvador Murrieta-Martinez, ever had permission to come into the United States?
>
> A. No, ma'am. I didn't find any paperwork applications to enter the United States in the A file.
>
> Q. You looked through the entire file?
>
> A. Yes, ma'am, I did.

Q. If he had received permission, would that be where it would be placed?

A. Yes, ma'am.

(RT August 16, 2005, p.82; EOR 59.)

Since Mr. Martinez's A-file did not reflect that he was admitted to the United States (RT August 16, 2005, pp.81-82; EOR 58-59.), 8 U.S.C. § 1227(a)(2)(A)(iii) did not apply. Since § 1227(a)(2)(A)(iii) did not apply, Mr. Martinez was eligible for discretionary relief in the form of voluntary departure under 8 U.S.C. § 1229c(a) or a waiver of inadmissibility under 8 U.S.C. § 1182(h). Agent Hardaway's failure to inform Mr. Martinez that he was eligible for voluntary departure was a due process violation identical to that in *United States v. Ortiz-Lopez*:

> "Ortiz-Lopez correctly argues that his due process rights were violated in the underlying deportation proceeding because the IJ failed to inform him that he was eligible for a fast-track voluntary departure in lieu of removal, under 8 U.S.C. § 1229c(a). Accordingly, Ortiz-Lopez will have met all of the requirements for a successful collateral attack on his § 1326 conviction – provided he can show that he could in fact have received voluntary departure under § 1229c(a) at the time of his removal hearing. See *Ubaldo-Figueroa*, 364 F.3d at 1050 ("The requirement that the IJ inform an alien of his or her ability to apply for relief from removal is mandatory, and failure to so inform the alien of his or her eligibility for relief from removal is a denial of due process that invalidates the underlying deportation proceeding.") (internal quotation marks omitted); see also *United States v. Arrieta*, 224 F.3d 1076 at 1079 (holding that a due process violation arose

> when the IJ had not performed its mandatory obligation to inform defendant of his eligibility for relief from deportation). The government does not argue otherwise."

United States v. Ortiz-Lopez, 385 F.3d 1202, 1204 (9th Cir. 2004). See also, *United States v. Muro-Inclan*, 249 F.3d 1180, 1184 (9th Cir. 2001) ("Failure to so inform the alien [of plausible eligibility for relief] is a denial of due process that invalidates the underlying deportation proceeding.").

Had Mr. Martinez departed voluntarily rather than being deported, he would not be liable for reentry following deportation under § 1326:

> "Of course, if Ortiz-Lopez had departed voluntarily instead of being removed, he would not now be liable under 8 U.S.C. § 1326 for illegal reentry following removal, because he would never have been removed."

United States v. Ortiz-Lopez, 385 F.3d at 1204.

Mr. Martinez's failure to exhaust his administrative remedies does not bar relief under 8 U.S.C. § 1326(d) where he was not advised of the possibility of relief. *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1044 (9th Cir. 2003) ("Ubaldo-Figueroa's waiver of his right to appeal his removal order was not sufficiently "considered and intelligent" because the IJ presiding over the removal proceeding failed to inform him that he had the right to appeal his removal order to the BIA."); *United States v. Muro-Inclan*, 249 F.3d 1180, 1182 (9th Cir. 2001) ("Such a waiver is not considered and intelligent when the record contains an inference that the petitioner is eligible for relief from deportation, but the Immigration Judge fails to

advise the alien of this possibility and give him the opportunity to develop the issue.").

Mr. Martinez's motion based on the inapplicability of 8 U.S.C. § 1227 was made pretrial by motion *in limine* and was addressed and preserved by standing objection the day before trial. (RT August 15, 2005, pp.61-67; EOR 35-38.)

III

RULE 803(8): THE GOVERNMENT, HAVING PREVIOUSLY DEPORTED MR. MARTINEZ WITHOUT A JUDGE, HAS RENDERED ITS RECORD OF THE DEPORTATION INADMISSIBLE HEARSAY UNDER RULE 803(8)(B) AS IT IS NOW A MATTER OBSERVED BY LAW ENFORCEMENT PERSONNEL RATHER THAN BY A JUDGE

One of the unintended consequences of INS's decision to conduct Mr. Martinez's 1998 deportation before an immigration agent rather than before a judge is that the resulting order of deportation no longer fits the public records hearsay exception of Rule 803(8). Parts (B) and (C) of the rule exclude "matters observed by police officers and other law enforcement personnel" and "factual findings resulting from an investigation made pursuant to authority granted by law."

Agent Hardaway, who signed the 1998 Notice of Intent to Issue a Final Administrative Removal Order as "*E. Hardaway, Immigration Agent*" is a law enforcement officer. (RT August 16, 2005, pp.70, 73-76; Government's Exhibit 3; EOR 10, 47, 50-53.) He did not testify at Mr. Martinez's trial. His factual findings in the form of his

1998 Final Administrative Removal Order, set forth below, were admitted, over defense objection, at trial:

> "Based upon the allegations set forth in the Notice of Intent to Issue a Final Administrative Removal Order and evidence contained in the administrative record, I, the undersigned Deciding Service Officer of the Immigration and Naturalization Service, make the following findings of fact and conclusions of law. I find that you are not a citizen or national of the United States and that you were not lawfully admitted for permanent residence. I further find that you have a final conviction of an aggravated felony as defined in section 101(a)(43) of the Act, 8 U.S.C. 1101(a)(43), and are ineligible for any relief from removal that the Attorney General may grant in an exercise of discretion. I further find that the administrative record established by clear, convincing, and unequivocal evidence that you are deportable as an alien pursuant to section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. 1227(a)(2)(A)(iii). By the power and authority vested in the Attorney General and in me as the Attorney General's delegate under the laws of the United States, I find you deportable as charged and order that you be removed from the United States to Mexico or to any alternate country prescribed in section 241 of the Act."

(RT August 16, 2005, pp.70, 76; Government's Exhibit 4; EOR 12, 47, 53.) The inadmissible 1998 Final Administrative Order was subsequently incorporated in the 2003 Warrant of Removal, set forth below, and also admitted over defense objection at trial:

> "Salvador Murrieta-Martinez, who entered the United States at Nogales, Arizona on January 3,

> 1998 is subject to removal/deportation from the United States, based upon a final order by a district director or a district director's designated official and pursuant to the following provisions of the Immigration and Nationality Act Section 237(a)(2)(A)(iii) or the Immigration and Nationality Act, as amended."

(RT August 16, 2005, pp.70, 76-80; Government's Exhibit 5; EOR 13, 47, 53-57.)

This court has previously approved the admission of a Warrant of Removal under Rule 803(8) to document an alien's departure, much the way the TECS computer documents the routine and ministerial crossing of vehicle license plates. *United States v. Bahena-Cardenas*, 411 F.3d 1067 (9th Cir. 2005); *United States v. Contreras*, 63 F.3d 852, 857 (9th Cir. 1995); *United States v. Hernandez-Rojas*, 617 F.2d 533 (9th Cir. 1980). Those cases did not, however, involve the additional layer of hearsay of an inadmissible underlying Final Administrative Removal Order. In fact, the Final Administrative Removal Order was never an issue in those cases – presumably because those orders were issued by an immigration judge.

Cases interpreting Rule 803(8) impute a "routine ministerial" exception to the rule. Witnessing an alien leave the country is a "routine, objective, cataloging of an unambiguous factual matter. . . . a ministerial, objective observation. *Bahena-Cardenas* at 1075. The agent witnessing the alien leave has no motivation to do anything other than "mechanically register an unambiguous factual matter." *United States v. Quezada*, 754 F.2d 1190, 1194 (5th Cir. 1985). It is "routine, non-adversarial" and "a ministerial, objective observation, which has inherent reliability because of the Government's need to keep

accurate records of the movement of aliens". *United States v. Hernandez-Rojas*, 617 F.2d 533, 535 (9th Cir. 1980). A Treasury Department data card reporting the license plate number of a vehicle crossing the United States border is a "routine, nonadversarial matter". *United States v. Orozco*, 590 F.2d 789, 793 (9th Cir. 1979). A police property receipt is prepared in a routine, non-adversarial setting, as opposed to one of subjective investigation. *United States v. Brown*, 9 F.3d 907, 911 (11th Cir. 1993). A fingerprint card "document[s] routine, unambiguous factual matters". *United States v. Dancy*, 861 F.2d 77, 79 (5th Cir. 1988). A breathalyzer calibration report is a record "of routine, nonadversarial matters made in a nonadversarial setting". *United States v. Wilmer*, 799 F.2d 495, 498 (9th Cir. 1986). A fingerprint lift card is "ministerial, objective, and nonevaluative". *United States v. Gilbert*, 774 F.2d 962, 965 (9th Cir. 1985).

On the other hand, however, a chemist's report and worksheet for a narcotics test, no matter how cut and dry, are "factual findings" and "evaluative" and inadmissible under Rule 803(8) for that reason. *United States v. Yakobov*, 712 F.2d 20, 25 (2nd Cir. 1983); *United States v. Oates*, 560 F.2d 45, 77 (2nd Cir. 1977). Agent Hardaway's Final Administrative Removal Order is similarly a "factual finding." In fact, it describes itself as "findings of fact and conclusions of law." Nor can a deportation proceeding be described as "non-adversarial." *Escobar Ruiz v. Immigration & Naturalization Service*, 813 F.2d 283 (9th Cir. 1987) (describing deportation proceeding as "a complex and adversarial hearing"). Mr. Martinez's 1998 deportation was an adversarial proceeding and an investigation and

Agent Hardaway's report, in the form of his "findings of fact and conclusions of law," is inadmissible hearsay.

Respectfully submitted,

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APPENDIX

210 Fed.Appx. 591

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SALVADOR MURRIETA-MARTINEZ, a.k.a. Slvador Murrieta-Martinez; a.k.a. Salvador Martinez, Defendant-Appellant.	No. 06-10006 D.C. No. CR-05-00451-FRZ MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Frank R. Zapata, District Judge, Presiding

Submitted December 5, 2006**
San Francisco, California

(Filed Dec. 7, 2006)

Before: T.G. NELSON, GOULD, and CALLAHAN, Circuit Judges.

Salvador Murrieta-Martinez appeals the district court's denial of his motion in limine to exclude certain documents from his Alien File ("A-file"), and a 1998 letter

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

to the Executive Office of Immigration Review requesting deportation, both of which the Government sought to introduce to satisfy the elements of 8 U.S.C. § 1326. Murrieta-Martinez also appeals the district court's ruling that the administrative removal procedure did not violate his due process rights.[1]

A. The District Court's Evidentiary Rulings

We review evidentiary decisions for an abuse of discretion. *See United States v. Alvarez,* 358 F.3d 1194, 1205 (9th Cir. 2004). *See also United States v. Pang,* 362 F.3d 1187, 1192 (9th Cir. 2004).

Records, reports, statements, or data compilations of public offices or agencies are admissible if they set forth "the activities of the office or agency, or matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel." Fed. R. Evid. 803(8). We have recognized that the law enforcement exception will not apply to ministerial matters, such as warrants of deportation. *See United States v. Hernandez-Rojas,* 617 F.2d 533, 535 (9th Cir. 1980) (holding exception inapplicable to warrant of deportation where notation that alien was deported was "ministerial, objective observation [with] inherent reliability because of the Government's need to keep accurate records of the movement of aliens").

---

[1] Because the facts are familiar to the parties, we do not recite them here except as necessary to clarify our decision.

The district court did not abuse its discretion in admitting the A-file documents in question.[2] The warrant of removal was admissible under *Hernandez-Rojas.* In regard to the Notice of Intent to Issue a Final Administrative Removal Order, the issuing officer noted on the document that he served Murrieta-Martinez on December 17, 1998, and that he witnessed Murrieta-Martinez sign the document in which he admitted that he was deportable and waived any contest to deportability. These acts were ministerial without any of "the features of the subjective report made by a law enforcement official in an on-the-scene investigation." *Hernandez-Rojas,* 617 F.2d at 535.

Even if the district court's admission of the removal order was an abuse of discretion under Federal Rule of Evidence 803(8), any error was harmless because the district court admitted the removal order together with the notice of intent and the warrant of removal, which demonstrated that a prior order of removal had issued and that Murrieta-Martinez had been removed from the United States, meeting the Government's burden of proof under 8 U.S.C. § 1326(a)(1).

The district court also did not abuse its discretion in admitting Murrieta-Martinez's 1998 letter requesting that he be deported. The letter was relevant to alienage because it tended to show that Murrieta-Martinez was not a

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[2] Agent Rivera testified that he had been a Border Patrol agent for 11 years, and was assigned to the Prosecutions Unit. He described the nature and function of an A-file, that access to the A-file was restricted, and that he was the designated custodian of the record. The district court did not abuse its discretion in concluding that Rivera was qualified to testify as a custodian of the records.

citizen of the United States.[3] *See* Fed. R. Evid. 401. Appellant's claim that statements in the letter required corroboration is incorrect. *See Warszower v. United States,* 312 U.S. 342, 347 (1941) (holding that the rule that an accused cannot be convicted on his uncorroborated confession has to do with confessions or admissions after the event, and not the uncorroborated declarations of the accused made before the event). Here, the 1998 letter requesting deportation was sent well before the February 2005 offense.

B. Due Process Claims

A collateral challenge to the underlying deportation proceeding is reviewed de novo. *United States v. Ahumada-Aguilar,* 295 F.3d 943, 947 (9th Cir. 2002).

Appellant's collateral attack on his removal on statutory and constitutional due process grounds is meritless. On statutory grounds, Appellant asserts that he is not deportable under 8 U.S.C. § 1227(a)(2)(A)(iii) and subject to administrative removal because he was not "admitted" to the United States and could have been eligible for voluntary departure and waiver of inadmissibility. This argument is foreclosed by *United States v. Hernandez-Vermudez,* 356 F.3d 1011 (9th Cir. 2004) (holding that for purposes of an aggravated felon's administrative removal pursuant to 8 U.S.C. § 1228(b) Congress intended that an alien who enters this country without inspection and an alien "admitted" to the United States are to be treated alike). Absent a distinction between admitted and undocumented

[3] The district court also did not abuse its discretion in regard to any prejudicial effect because the letter was written while Appellant was incarcerated. Any prejudice due to the circumstances of the letter is too slight to have barred admission under Federal Rule Evidence 403.

aliens, it is clear that Murrieta-Martinez, as an alien convicted of an aggravated felony, was deportable under § 1227(a)(2)(A)(iii), could be removed under § 1228(b), and was not entitled to other relief.[4]

Murrieta-Martinez also claims that the removal procedure was fundamentally unfair because he was not provided an opportunity to present his claims to a "neutral" immigration judge. A defendant can prevail on a claim of fundamental unfairness "only if he is able to demonstrate that: (1) his due process rights were violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice as a result of the defects." *United States v. Zarate-Martinez,* 133 F.3d 1194, 1197 (9th Cir. 1998); 8 U.S.C. § 1326(d). Due process claims based on bald assertions that immigration officials cannot perform their adjudicative functions neutrally are insufficient. *See United States v. Garcia-Martinez,* 228 F.3d 956, 961-962 (9th Cir. 2000) (rejecting arguments that "presume bias from the mere institutional structure of the INS" or that claim "agency members who participate in an investigation are disqualified from adjudicating"). Here, Appellant advances no valid allegations that the removal procedure was defective. Appellant also has not demonstrated actual prejudice, which requires a showing of "plausible grounds for relief from deportation." *Garcia-Martinez,* 228 F.3d at 963.

AFFIRMED.

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[4] *See* 8 U.S.C. § 1182(h) (barring eligibility for waiver of inadmissibility to an alien who "has been convicted of an aggravated felony"); 8 U.S.C. § 1229 (eligibility for voluntary departure applies only to aliens who are "not deportable under section 1227(a)(2)(A)(iii)").

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

United States of America

v.

SALVADOR MURRIETA-MARTINEZ

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

No. CR 05-00451-001-TUC-FRZ(JM)

S. Jonathan Young (Retained)
Attorney for Defendant

USM#: 12198-208 ICE#: A77 137 336

THERE WAS A verdict of guilty on 8/18/05 as to the Indictment.

ACCORDINGLY, THE COURT HAS ADJUDICATED THAT THE DEFENDANT IS GUILTY OF THE FOLLOWING OFFENSE(S): violating Title 8, USC §1326(a), Illegal Re-Entry after Deportation, with sentencing enhancement pursuant to Title 8, USC §1326(b)(2), a Class C Felony offense, as charged in the Indictment.

IT IS THE JUDGMENT OF THIS COURT THAT the defendant is hereby committed to the custody of the Bureau of Prisons for a term of **SIXTY (60) MONTHS**, with credit for time served. Upon release from imprisonment, the defendant shall be placed on supervised release for a term of **THREE (3) YEARS**.

CRIMINAL MONETARY PENALTIES

The defendant shall pay to the Clerk the following total criminal monetary penalties:

SPECIAL ASSESSMENT: $100.00 **FINE:** $-0-
RESTITUTION: $-0-

The Court finds the defendant does not have the ability to pay a fine and orders the fine waived.

If incarcerated, payment of criminal monetary penalties are due during imprisonment at a rate of not less than $25 per quarter and payment shall be made through the Bureau of Prisons' Inmate Financial Responsibility Program. Criminal Monetary Payments shall be made to the Clerk of U.S. District Court, Attention: Finance, Suite 130, 401 West Washington Street, SPC 1, Phoenix, Arizona 85003-2118. Payments should be credited to the various monetary penalties imposed by the Court in the priority established under 18 U.S.C. § 3612(c). The total special assessment of $100.00 shall be paid pursuant to Title 18, United States Code, Section 3013 for Count 1 of the Indictment.

Any unpaid balance shall become a condition of supervision and shall be paid within 90 days prior to the expiration of supervision. Until all restitutions, fines, special assessments and costs are fully paid, the defendant shall immediately notify the Clerk, U.S. District Court, of any change in name and address. The Court hereby waives the imposition of interest and penalties on any unpaid balances.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant is placed on supervised release for a term of **THREE (3) YEARS**.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

For offenses committed on or after September 13, 1994: The defendant shall refrain from any unlawful use of a controlled substance. Pursuant to 18 USC §3563(a)(5) and 3583(d) the defendant shall submit to one drug test within 15 days of release from imprisonment and such other periodic drug tests thereafter, as directed from time to time by the probation officer.

The defendant shall not possess a firearm, ammunition or other dangerous weapon as defined in 18 U.S.C. §921.

The defendant shall comply with the standard conditions of supervision adopted by this Court in General Order 04-11:

1) You shall not commit another federal, state, or local crime during the term of supervision.

2) You shall not leave the judicial district or other specified geographic area without the permission of the Court or probation officer.

3) You shall report to the Probation Office as directed by the Court or probation officer, and shall submit a truthful and complete written report within the first five days of each month.

4) You shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

5) You shall support your dependents and meet other family responsibilities.

6) You shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

7) You shall notify the probation officer at least ten days prior to any change of residence or employment.

8) You shall refrain from excessive use of alcohol and are subject to being prohibited from the use of alcohol if ordered by the Court in a special condition of supervision.

9) You shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 801) or any paraphernalia related to such substances, without a prescription by a licensed medical practitioner. Possession of controlled substances will result in mandatory revocation of your term of supervision.

10) You shall not frequent places where controlled substances are illegally sold, used, distributed or administered, or other places specified by the Court.

11) You shall not associate with any persons engaged in criminal activity, and shall not associated with any person convicted of a felony unless granted permission to do so by the probation officer.

12) You shall permit a probation officer to visit at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

13) You shall immediately notify the probation officer (within forty-eight (48) hours if during a weekend or on a holiday) of being arrested or questioned by a law enforcement officer.

14) You shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the Court.

15) As directed by the probation office, you shall notify third parties of risks that may be occasioned by your criminal record or personal history or characteristics, and shall permit the probation officer to make such notification and to confirm your compliance with such notification requirement.

16) If you have ever been convicted of a felony, you shall refrain from possessing a firearm, ammunition, destructive device, or other dangerous weapon. If you have ever been convicted of a misdemeanor involving domestic violence, you shall refrain from possession of any firearm or ammunition. Possession of a firearm will result in mandatory revocation of your term of supervision. This prohibition does not apply to misdemeanor cases that did not entail domestic violence, unless a special condition is imposed by the Court.

17) Unless suspended by the Court, you shall submit to one substance abuse test within the first 15 days of supervision and at least two periodic substance abuse tests thereafter, pursuant to 18 U.S.C. §§ 3563(a)(5) and 3583(d);

18) If supervision follows a term of imprisonment, you shall report in person to the Probation Office in the district to which you are released within seventy-two (72) hours of release.

19) You shall pay any monetary penalties as ordered by the Court. You will notify the probation officer of any material change in your economic circumstances that might affect your ability to pay restitution, fines, or special assessments.

The following special conditions are in addition to the conditions of supervised release or supersede any related standard condition:

1. Violate no federal, state or local laws.
2. If deported, you shall not re-enter the United States without legal authorization.
3. You shall cooperate in the collection of DNA as directed by the probation officer.

THE DEFENDANT IS ADVISED OF DEFENDANT'S RIGHT TO APPEAL WITHIN 10 DAYS OF ENTRY OF JUDGMENT.

The Court may change the conditions of probation or supervised release or extend the term of supervision, if less than the authorized maximum, at any time during the period of probation or supervised release. The Court may issue a warrant and revoke the original or any subsequent sentence for a violation occurring during the period of probation or supervised release.

IT IS FURTHER ORDERED that the Clerk of the Court deliver two certified copies of this judgment to the United States Marshal of this district.

The Court orders commitment to the custody of the Bureau of Prisons and recommends: that the defendant be placed in an institution in southern Arizona

Date of Imposition of Sentence: **Monday, November 21, 2005**

DATED this 6th day of December, 2005.

/s/ Frank R. Zapata
FRANK R. ZAPATA
United States District Judge

RETURN

I have executed this Judgment as follows: _____

Defendant delivered on _____ to _____ at _____, the institution designated by the Bureau of Prisons, with a certified copy of this judgment in a Criminal case.

_____ By: _____
United States Marshal Deputy Marshal

CC: USA/CNSL (S. Jonathan Young)/PROB(1)/PTS/FIN/JUDGE/USM(2 certified)/ICE (1 certified)/Order Book

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. SALVADOR MURIETTA-MARTINEZ, a.k.a. Slvador Murietta-Martinez; a.k.a. Salvador Martinez, Defendant-Appellant.	No. 06-10006 D.C. No. CR-05-00451-FRZ District of Arizona, Tucson ORDER (Filed Feb. 8, 2007)

Before: T.G. NELSON, GOULD, and CALLAHAN, Circuit Judges.

The Petition for Rehearing is DENIED.